SUPREME COURT

FAMILY PRACTICE COMMITTEE

2000 - 2002 REPORT

January 15, 2002

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I. Proposed Rule Amendments Recommended for Adoption

A. Proposed Amendments to *R.* 5:3-3 - Appointment of Experts

Discussion

The Custody and Parenting Time Subcommittee found that the common view of mental health professionals, based upon their training, and of lawyers and judges, based upon their experiences, that custody evaluations are traumatic for the adults and children. A vast body of mental health literature supports the view that the lengthier and more involved the evaluation process, the more traumatic it is for children. Although this trauma may be short term, and may be necessary for a greater long term good (designation of the proper parenting custodian and allocation of parenting responsibilities), nevertheless, the Committee believes there are sufficient countervailing concerns to recommend strict non-partisan evaluations regardless of by whom the expert has been retained.

This is particularly so since the protocol of all mental health groups - - psychologists, psychiatrists and social workers - - are premised upon the view that the expert's obligation is to consider what is best for the child, regardless of by whom the expert has been hired. The Standards of the American Academy of Child and Adolescent Psychiatrists requires psychiatrists to "conduct the evaluation as a neutral, impartial advocate for the best interests of the child to maximize credibility of the report". See AACAP, Official Action, Practice Parameter for Child Custody Evaluations, Journal of American Academy of Child and Adolescent Psychiatrists, Page 63S. That is a requirement regardless of who has retained the expert. The Specialty Guidelines of the New Jersey Board of Psychological Examiners for Custody and Visitation Evaluations requires psychologists to "provide comprehensive, objective impartial custody visitation evaluations in order to provide information to the court or to attorneys which assists in making decisions as to custody and visitation arrangements that will best provide for the needs of the minor children involved". These Guidelines further provide that evaluations are to be conducted in accordance with the legal standard of the best interests of the child. The Guidelines state:

"Psychologists comply with this standard regardless of the specific contractual relationship under which they are providing services". See Specialty Guidelines for Psychologists in Custody and Visitation Evaluations, 1993, Page 1(a) and (b).

The 1994 Guidelines of the American Psychological Association for child custody evaluations provides:

> Psychologists should be impartial regardless of whether he or she is retained by the court or by a party to the proceeding. If either the psychologist or the client cannot accept his neutral role, the psychologist should consider withdrawing from the case. See Practice Directory, Guidelines for Child Custody Evaluations in Divorce Proceedings, July, 1994, American Psychological Association, Page 3.

To shorten the evaluation process and to reduce partisanship, the Committee believes the experts should be directed to conduct strictly non-partisan parenting/custody evaluations, regardless of by whom they are engaged. After all, this is what the protocol of each mental health group requires.

It is hoped this will reduce the number of evaluations, and also help legitimize non-partisanship. Although the professional standards for the various mental health groups indicate that each mental health professional is supposed to do an evaluation based upon what is best for the children, regardless of who has retained him or her, we think it is fair to conclude from our experience that there may be spins given in opinions based upon which party engaged the expert.

If there are disagreements between the experts, the Rule provides the court may order them to confer in an attempt either to reach a resolution of all or a portion of the outstanding issues, or to make a common recommendation. See "High Conflict Custody Cases: Reforming the System for Children Conference Report and Action Plan", Family Law Quarterly, Volume 34, Number 4, Winter 2001, p. 593 conference sponsored by the American Bar Association Family Law Section and The Johnson Foundation, Wingspread Conference Center, Racine Wisconsin, September 8-10, 2000.

Public policy encourages resolution of disputes between litigants and nowhere is this policy more important than in connection with disputes between parents about their own children. Encouraging communication between experts will foster resolution by litigants and minimize judicial involvement. If resolution is impossible and trial must occur, the Rule provides that, before that day arrives, there is potential for full dialogue about differences in an attempt to resolve issues or to foster a common recommendation.

At the final meeting of the Family Practice Committee on December 4, 2001, while the recommendation was approved by the majority the vote was split, with approximately 2/3 in favor of the recommendation and 1/3 opposed.

Proposed Rule Change

5:3-3. Appointment of Experts

(a) ... no change

(b) ... no change

(c) ... no change

(d) Custody/Parenting Disputes. Mental health experts who perform parenting/custody evaluations shall conduct strictly non-partisan evaluations to arrive at their view of the child's best interests, regardless of by whom they are engaged. They should consider and include reference to criteria set forth in N.J.S.A. 9:2-4, as well as any other information or factors they believe pertinent to each case. If the mental health professionals reach diverse views concerning the parenting/custody arrangement that is in the best interests of the children, the Court may direct them to confer in an attempt either to reach a resolution of all or a portion of the outstanding issues, or to make a common recommendation.

(e) ... (Redesignated)

(f) ... (Redesignated)

(g) ... (Redesignated)

(h) ... (Redesignated)

Note: Source---R. (1969) 5:3-5, 5:3-6. Adopted December 20, 1983, to be effective December 31, 1983; caption amended, former rule redesignated paragraph (a) and paragraph (b)(1), (2), (3), (4) and (5) adopted November 7, 1988 to be effective January 2, 1989; former paragraphs (b)(1), (2), (3), (4), and (5) captioned and redesignated as (c), (d), (e), (f) and (g) respectively June 29, 1990 to be effective September 4, 1990; paragraph (a) amended January 21, 1999 to be effective April 5, 1999; paragraph (d) added and former paragraphs (d), (e), (f), and (g) redesignated as (e), (f), (g) and (h) to be effective .

B. Proposed Amendments to *R.* 5:4-2 – Complaint

Discussion

The General Procedures and Rules Subcommittee has considered several issues focusing upon *R.* 5:4-2(f) entitled "Affidavit of Insurance Coverage". As presently constituted the Rule reads as follows:

> (f) Affidavit of Insurance coverage. The first pleading of each party shall have annexed thereto an affidavit listing all known insurance coverage of the parties and their minor children, including but not limited to life, health, automobile, and homeowner's insurance. The affidavit shall specify the name of the insurance company, the policy number, the named insured and, if applicable, other persons covered by the policy; a description of the coverage including the policy term, if applicable; and in the case of life insurance, an identification of the named beneficiaries. The affidavit shall also specify whether any insurance coverage was canceled or modified within the ninety days preceding its date and, if so, a description of the canceled insurance coverage. Insurance coverage identified in the affidavit shall be maintained pending further order of the court.

The Subcommittee recommends the following amendments to the existing Rule:

(1) **Affidavit/Certification:** It is noted that the existing Rule provides that, "[t]he first pleading of each party shall have annexed thereto an **affidavit** listing all known insurance coverage . . . . " (emphasis added) The Subcommittee is satisfied that many attorneys now utilize a certification rather than an affidavit format for presenting the information required by this Rule. It has been anecdotally reported that some attorneys have encountered rejection of pleadings because an affidavit was not utilized. Although elsewhere, the Rules permit

substituting a certification for an affidavit, S*ee R.* 1:4-4(b), the Subcommittee recommends that *R.*5:4-2(f) be amended to read "[t]he first pleading of each party shall have annexed thereto an affidavit **or a certification** listing all known insurance coverage . . . ." (emphasis added).

(2) **Recommendation for alternate certification in settles cases:** The Subcommittee recognizes that circumstances exist where, before the filing of a complaint, the parties have already negotiated and concluded a Property Settlement Agreement disposing of all collateral issues including alimony an child support, reaching an accord to the effect that there is no obligation to maintain life or other insurance coverage. The Subcommittee has concluded that where a comprehensive Property Settlement Agreement has been entered, there is no need for there to be attached to the a complaint a Certification of Insurance Coverage.

In making this recommendation, the subcommittee expresses concern that, absent a requirement to file an alternate certification, confusion might be created in the Clerk offices. The Subcommittee is concerned that, absent providing a clear indication to the Clerk's office that a full Certification of Insurance Coverage is not required, complaints might be rejected. Accordingly, it is recommended that *R.* 5:4-2(f) should also be amended to reflect that where there has been concluded a Property Settlement Agreement which addresses the insurance obligations, if any, of the parties, the Certification to be provided may simply contain that representation.

(3) **Recommendation for alternate certification in cases in which no collateral relief is sought:** Similarly, in those cases in which no relief other than a dissolution of the marriage is sought there is no need for their to be a listing of existing insurance coverage. There would, however be an obligation for the affidavit to be attached indicating that no collateral relief is sought and further acknowledging that in the event the responsive pleading

seeks collateral relief, an Affidavit/Certification of Insurance Coverage shall be filed within 20 days.

Proposed Rule Change

Rule 5:4-2. Complaint

(a) … no change

(b) … no change

(c) … no change

(d) … no change

(e) … no change

(f) Affidavit or Certification of Insurance Coverage. The first pleading of each part shall have annexed thereto an affidavit or a certification listing all known insurance coverage of the parties and their minor children, including but not limited to life, health, automobile, and homeowner's insurance. The affidavit or certification shall specify the name of the insurance company, the policy number, the named insured and, if applicable, other persons covered by the policy; a description of the coverage including the policy term, if applicable; and in the case of life insurance, an identification of the named beneficiaries. The affidavit or certification shall also specify whether any insurance coverage was canceled or modified within the ninety days preceding its date and, if so, a description of the canceled insurance coverage. Insurance coverage identified in the affidavit or certification shall be maintained pending further order of the court. In those matters in which there has been concluded a property settlement agreement which addresses the insurance obligations of the parties, if any, the affidavit or certification required to be provided shall not be required to include the information required by this Rule but need only specify that a property settlement agreement has been concluded which addresses the

insurance obligations of the parties, if any. In those matters in which no relief other than a dissolution of marriage is sought, the affidavit or certification here required shall not be required to include the information required by this Rule but need only specify that no relief is sought other than the dissolution of marriage. In the event that any financial relief is then sought by the responding party other than the dissolution of marriage, the responding party shall be required to annex to the responsive pleading the full affidavit or certification of insurance coverage required by this Rule and the moving party shall be required to file a full affidavit or certification of insurance coverage within twenty days of service of the responsive pleading.

Note: Source—R. (1969) 4:77-1(a)(b)(c)(d), 4:77-2, 4:77-3, 4:77-4, 4:78-3, 5:4-1(a) (first two sentences.). Adopted December 20, 1983, to be effective December 31, 1983; paragraph (b)(2) amended November 5, 1986 to be effective January 1, 1987; paragraphs (a)(2) and (d) amended November 2, 1987 to be effective January 1, 1988; paragraphs (b)(2) and (c) amended July 13, 1994 to be effective September 1, 1994; paragraph (a)(2) amended July 10, 1998 to be effective September 1, 1998; new paragraph (f) adopted January 21, 1999 to be effective April 5, 1999; paragraph (f) amended to be effective .

C. Proposed Amendments to *R.* 5:5-2 - Case Information Statement

Discussion

The General Procedures and Rules Subcommittee considered the issue of whether the Rules should be amended to include the requirement that a Case Information Statement be completed and filed in those instances in which default is entered where there will be, consistent with *R.*5:5-2(e), the filing of a Notice for Equitable Distribution, Alimony, Child Support and Other Relief. The Subcommittee has concluded that the Rule should be so amended and the full Supreme Court Family Practice Committee agreed at its final meeting on December 4, 2001.

Proposed Rule Change

Rule 5:5-2. Case Information Statement

(a) … no change

(b) … no change

(c) … no change

(d) … no change

(e) Default; Notice for Equitable Distribution, Alimony, Child Support and Other Relief. In those cases where equitable distribution, alimony, child support and other relief are sought and a default has been entered, the plaintiff shall file and serve upon the defaulting party, in accordance with R. 1:5-2, A Notice of Application for Equitable Distribution, Alimony, Child Support and Other Relief, not less than 20 days prior to the hearing date. The notice shall include the proposed trial date, a statement of the value of each asset and the amount of each debt sought to be distributed, a proposal for distribution and a statement whether plaintiff is seeking alimony and/or child support and, if so, in what amount and a statement as to all other relief sought. The Notice shall have annexed thereto a completed and filed Case Information Statement in the form set forth in Appendix V of these rules. Where a written property settlement agreement has been executed, plaintiff shall not be obligated to file such a notice. When the summons and complaint have been served on the defendant by substituted service pursuant to R. 4:4-4, a copy of the Notice of Application for Equitable Distribution, Alimony, Child Support and Other Relief Sought shall be filed with the County Clerk of the county of venue and notice thereof shall be served upon the defendant in the same manner as the summons and complaint or in any other manner permitted by the court, at least twenty (20) days prior to the date set for hearing. The notice shall state that such a notice has been filed with the County Clerk and can be examined by the defendant at the Clerk's office during normal business hours. The notice shall provide the address of the County Clerk's office where the notice has been filed.

Note: Source---R. (1969) 4:79-2. Adopted December 20, 1983, to be effective December 31, 1983; amended January 10, 1984, to be effective April 1, 1984; paragraphs (b) and (e) amended November 5, 1986 to be effective January 1, 1987; paragraphs (b) and (e) amended November 2, 1987 to be effective January 1, 1988; paragraphs (a) and (e) amended November 7, 1988 to be effective January 2, 1989; paragraph (e) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended January 21, 1999 to be effective April 5, 1999.

D. Proposed Amendments to *R.* 5:5-4 - Motions in Family Actions

Discussion

The General Procedures and Rules Subcommittee has considered the desirability of adopting a "Same Day Rule" or "No Day Rule" applicable to the entry of Orders following hearings on Family Part motions. In considering this issue, the Subcommittee specifically notes recommendation 26 of the Supreme Court Special Committee on Matrimonial Litigation which reads:

> THERE SHOULD BE A NEW RULE CREATING A PROCEDURE FOR EXPEDITIOUS ENTRY OF ORDERS FOLLOWING DETERMINATION OF A MOTION. THE RULE SHOULD CONTAIN A PRESUMPTION IN FAVOR OF THE ENTRY OF THE MOTION ORDER PRIOR TO COUNSEL, OR THE PARTIES IF THEY ARE PRE SE, LEAVING THE COURTHOUSE.

The Special Committee's commentary with regard to this matter in its 1998 Final Report was as follows:

> First, the Committee approvingly refers to an effort now underway in Cumberland County, and perhaps elsewhere, where the court provides counsel with blank forms of order with built in carbon so that the order might then be immediately completed. Such forms should be made available statewide so that when the pre-prepared orders could not easily be tailored to include all of the court's ruling, the orders could still be completed before counsel/the parties leave the courthouse. This practice has come to be known as the "no-day" rule, a take-off on a 5-day rule that has become the favored method of submitting Family Part orders. A copy of the blank form of order in use in Cumberland County is included in Section A-3 of the Appendix to this Report.

> Second, the committee also approvingly cites the effort in Ocean County where computer generated orders prepared by the court are distributed, reviewed and settled, again before counsel leave the courthouse. Implementation of such a program would depend on the availability of the requisite hardware and software.
>
> * * * * *
>
> Both the Cumberland and Ocean County initiatives reflect the ingenuity and practicality of the judges who have conceived and implemented the programs involved. Although both programs require the investment of more time for both the bench and bar when a motion is heard, both save an even greater amount of time by eliminating what would be otherwise unnecessary hearings to later resolve the forms of disputed orders. The committee encourages other vicinages to either adopt the Cumberland or Ocean County programs or to formulate programs of their own to reduce the number of orders not formally reduced to writing on the day a motion is argued and decided. Although the Committee generally disapproves of local practice rules, the type of innovation we recommend should be allowed to continue with the view that, toward the end of the 1998-2000 rules cycle, the Family Division Practice Committee could review the programs in place to seek possible uniformity.

In its Administrative Determination concerning Recommendation 26, the Supreme Court observed, "[j]udges handling matrimonial motions should enter the order expeditiously, using whenever possible the form of order submitted with the motion (recognizing the need to tailor or revise the submitted forms of order to reflect the ruling made). Further, the Court would encourage the use of computer-generated orders prepared by the court on the bench, as in Ocean County, wherever resources permit."

In the several years since the issuance of the Special Committee's Report and in the almost three years since the issuance by the Supreme Court of its Administrative Determinations on the Recommendations of the Special Committee, the Subcommittee on General Procedures

and Rules notes that substantial progress has been made and that, in many if not most vicinages, same day orders have become common place.

It is now recommended that the logical progression started by the work of the Special Committee should be completed. An amendment to *R.*5:5-4 captioned "Motions in Family Actions" should be adopted. It is specifically proposed that *R.*5:5-4(f) should be created as a "New Rule".

Proposed Rule Change

R.5:5-4. Motions in Family Actions

(a) … no change

(b) … no change

(c) … no change

(d) … no change

(e) … no change

(f) Orders on Family Part Motions. At the conclusion of each motion hearing, absent good cause to the contrary, a written order shall be entered.

Note: Source---R. (1969) 4:79-11. Adopted December 20, 1983, to be effective December 31, 1983; amended November 2, 1987 to be effective January 1, 1988; former rule amended and redesignated paragraph (a) and paragraph (b) adopted June 29, 1990 to be effective September 4, 1990; paragraph (b) amended and paragraph (c) adopted June 28, 1996 effective as of September 1, 1996; captions of paragraphs (a) and (b) amended and paragraph (d) adopted July 10, 1998 to be effective September 1, 1998; new paragraph (b) added and former paragraphs (b), (c), and (d) redesignated as paragraphs (c), (d), and (e) January 21, 1999 to be effective April 5, 1999; paragraph (d) amended July 5, 2000 to be effective September 5, 2000; paragraph (f) added____ _____ to be effective_____.

The Subcommittee also recommends the following as approved commentary (under the "Comment" section) for the proposed new *R.* 5:5-4 (f):

The mandate of R.5:5-4(f) may be satisfied in a variety of ways including but not necessarily limited to the creation of a handwritten form of order; or creation/modification of a computer generated form order created by the court or counsel. Following a specific format is less important than assuring that a form of order is entered immediately following the motion hearing.

E. Proposed Amendments to *R.* 5:6A, Appendix IX and IX-B - Child Support Guidelines (Two Recommendations)

Discussion as to the first recommendation

The discussions of the Child Support Subcommittee regarding the Earned Income Tax Credit as well as the inappropriate use of means-tested income, e.g. Temporary Assistance for Need Families (TANF) in calculating child support obligations, results in a recommendation to amend *Rule* 5:6A, Appendix IX in order to exclude these types of income from use in the Child Support Guidelines calculations.

The Subcommittee discussed the federal Earned Income Tax Credit, an issue raised by Judge Charles Rand who was concerned that the Guidelines were unclear in it use and also that the Family*Soft* software did not have a means to calculate the Earned Income Tax Credit. The focus of the discussion was to initially determine whether the Earned Income Tax Credit should be used and if yes, then to develop a consistent policy. Nancy Goldhill opined that is use would frustrate the intent of the federal and state governments to protect and help low-income families. She thought that the Earned Income Tax Credit (both federal and state) should be treated as means-tested income.

The Subcommittee also gave consideration to a letter submitted by Daniel Phillips, of the Office of Public Affairs of the Administrative Office of the Courts, detailing the history of the Earned Income Tax Credit as a long-standing and expansive federal anti-poverty program since

1975. He also indicated that New Jersey's state Earned Income Tax Credit was viewed as an expansion of the federal credit for low-income families and as a continuation of the state's commitment to welfare reform and the effort to help families provide better lives for children in the transition from welfare-to-work. A sample calculation was reviewed by all and it was determined that the impact on the net child support award was negligible, and furthermore, that the needs of the family being supported should outweigh the small benefit to the non-custodial parent.

The Child Support Subcommittee's vote was to recommend that in the interest of fairness and considering the reasons that the federal and state government granted such federal and state income tax credits, that Earned Income Tax Credit, whether state or federal in origin, should not be used in calculating child support awards. The Subcommittee recommends that the line instructions be amended to place Earned Income Federal (and State) Tax Credit under *Types of Income Excluded from Gross Income* and clarify that such income is excluded from gross income to calculate support awards.

The Subcommittee also agreed with the need to remove "welfare and other public assistance benefits" from the list of non-taxable income sources listed in the Guidelines. The discussion revealed that the means-tested income such as public assistance (TANF) was being improperly used in calculating child support awards. The listing of means-tested income under non-taxable income was contributing to the misinterpretation. The use of means-tested income to calculate child support awards contravenes the intent of the Guidelines. It is hoped that the removal of this language clarifies that the non-taxable status of means-tested income does not render it income for purposes of child support.

This was not intended by the Guidelines. Means-tested benefits are excluded from gross income and cannot become a subcategory of gross income. The list of non-taxable income was adopted from an IRS definition created for very different purposes. Its use was never meant to contradict the Guidelines' exclusion of these benefits and their stated purpose of protecting individuals with minimal income. The subcommittee recommends that "welfare and other public assistance benefits" be removed from the list of non-taxable income sources in the Guidelines Line Instructions. This recommendation is consistent with the treatment of means-tested income in the Guidelines. Please see Appendix attached for the recommended technical amendments.

First Proposed Rule Change

Appendix IX-B

LINE INSTRUCTIONS FOR THE SOLE-PARENTING WORKSHEET

Lines 1 through 5 - Determining Income

. . .

Types of Income Excluded from Gross Income

. . .

j. federal earned income tax credits

. . .

Taxable and Non-Taxable Income

1. *Income Not Subject to Federal Income Tax*

. . .

[i. Welfare and other public assistance benefits]

[j.] i. Life insurance proceeds paid due to death of the insured;

[k]. j. Social Security benefits. However, if the taxpayer has income of more than $25,000 if single or $32,000 if married and filing a joint return some of the benefits may be taxable (see IRS Publication 915);

[l.] k. Casualty insurance and other reimbursements; and

[m.] l. Earnings from tax-free government bonds or securities.

Discussion as to the second recommendation

The Child Support Subcommittee noted a number of references in the court rules to the term "visitation" where the term "shared visiting time" would be more precise. The subcommittee recommends that references to "visitation" should be substituted with "shared parenting time", where appropriate. The Child Support Subcommittee notes that such substitutions would not work in all instances.

Second Proposed Rule Change

Please see Appendix F, annexed hereto, for the recommended technical amendments.

F. Proposed Amendments to *R.* 5:7-4 - Alimony and Child Support Payments

Discussion

A suggested amendment to *Rule* 5:7-4(b) Payments through the Probation Division is attached as Appendix 2. Centralized payments and disbursements through the State Disbursement Unit are in place since the Division of Family Development, the Title IV-D agency, contracted with Tier Technologies to accomplish the mandate for all payments formerly payable and sent to the county Probation Divisions throughout the state now be made payable

and be submitted to the New Jersey Family Support Payment Center. (*N.J.S.A.* 2A:17-56.63). Since enforcement is still based on the county of the obligor's residence, review of *Rule* 5:7-4(b) needs to continue to ensure that it is current and meets the changes from laws such as the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) and the Child Support Program Improvement Act.

Proposed Rule Change

Rule 5:7-4. Alimony and Child Support Payments

(a) . . . no change

(b) Payments Through the Probation Division. The judgment or order [shall be enforceable in the county of the obligor's residence and] shall provide that payments be made ["through the Probation Division of the county in which the obligor resides."] to the New Jersey Family Support Payment Center.

G. Proposed Amendments to *R.* 5:7A - Domestic Violence Restraining Orders

Discussion

The Appellate Division in the case of *State v. Whitaker*, 326, *N.J. Super.* 252 (App.Div.1999) commented that the Municipal Court Judge did not record or even speak to the domestic violence victim when issuing a temporary restraining order and that this was in violation of the Court Rules. The issue presented by this case and referred to the Subcommittee was whether the Domestic Violence Law conflicted with the Court Rules by stating that a judge can issue a temporary restraining order without the victim being physically present pursuant to Court Rules.

The Domestic Violence Subcommittee reviewed the specific language in section *N.J.S.A.* 2C:25-28h.of the Domestic Violence Law which states, "A judge may issue a temporary restraining order upon sworn testimony or complaint of an applicant who is not physically present, pursuant to court rules . . . ." Court *Rule* 5:7A requires that an applicant for a temporary restraining order shall appear before a judge personally to testify upon the record or that the

judge can issue an temporary restraining order upon sworn oral testimony of an applicant who is not physically present as long as the sworn oral testimony is communicated to the judge by telephone, radio or other means of electronic communication. The judge or law enforcement officer must then either record the sworn oral testimony by means of a tape recording device, stenographic machine or long hand notes of the judge.

The Subcommittee determined that the Court Rule and the Domestic Violence Law are not in conflict and require the same procedure to be followed. The Subcommittee indicated that the Domestic Violence Law allows the issuance of a temporary restraining order without the victim being present as long as it is done in accordance with the Court Rules. Therefore, as long as there is a recording of the victim=s testimony or the judge keeps long hand notes of the victim=s testimony, than the victim does not actually have to physically appear before the judge. The Subcommittee indicated the appellate panel in *State v. Whitaker* was highlighting and reminding all judges that it is mandatory that either a recording be made or notes kept of the victim=s testimony whenever the victim does not actually appear before a judge.

The Subcommittee did however, point out that Court *Rule* 5:7A was never changed to reflect the accurate statutory citations to the Domestic Violence Law when the law was amended in 1990. The Subcommittee recommended that the Court Rule be corrected to reflect the accurate citations to the Domestic Violence Law.

Proposed Rule Change

5:7A. DOMESTIC VIOLENCE: RESTRAINING ORDERS

(a) Application for Temporary Restraining Order. Except as provided in paragraph herein, an applicant for a temporary restraining order shall appear before a judge personally to testify upon the record or by sworn complaint submitted pursuant to [N.J.S.A. 2C:25-12] N.J.S.A. 2C:25-28. If it appears that the applicant is in danger of domestic violence, the judge shall, upon consideration of the applicant=s domestic violence affidavit, complaint or testimony, order emergency relief including ex parte relief, in the nature of a temporary restraining order as authorized by [N.J.S.A. 2C:25-1 et seq.] N.J.S.A. 2C:25-17 et seq.

(b) Issuance of Temporary Restraining Order by Electronic Communication. A judge may issue a temporary restraining order upon sworn oral testimony of an applicant who is not physically present. Such sworn oral testimony may be communicated to the judge by telephone, radio or other means of electronic communication. The judge or law enforcement officer assisting the applicant shall contemporaneously record such sworn oral testimony by means of a tape-recording device or stenographic machine if such are available; otherwise, adequate long hand notes summarizing what is said shall be made by the judge. Subsequent to taking the oath, the applicant must identify himself or herself, specify the purpose of the request and disclose the basis of the application. This sworn testimony shall be deemed to be an affidavit for the purposes of issuance of a temporary restraining order. A temporary restraining order may issue if the judge is satisfied that exigent circumstances exist sufficient to excuse the failure of the applicant to appear personally and that sufficient grounds for granting the application have been shown. Upon issuance of the temporary restraining order, the judge shall memorialize the specific terms of the order and shall direct the law enforcement officer assisting the applicant to enter the judge=s authorization verbatim on a form, or other appropriate paper, designated the duplicate original temporary restraining order. This order shall be deemed a temporary restraining order for the purpose of [N.J.S.A. 2C:25-14] N.J.S.A. 2C:25-28. The judge shall direct the law enforcement officer assisting applicant to print the judge=s name on the temporary restraining order. The judge shall also contemporaneously record factual determinations. Contemporaneously the judge shall issue a written confirmatory order and shall enter thereon the exact time of issuance of the duplicate order. In all other respects, the method of issuance and contents of the order shall be that required by sub-section (a) of this rule.

(c) ... no change

(d) ... no change

(e) Procedure upon Arrest without a Warrant. Whenever a law enforcement officer has effected an arrest without a warrant on a criminal complaint brought for a violation otherwise defined as an offense under the Prevention of Domestic Violence Act, [N.J.S.A. 2C:25-1 et seq.]

N.J.S.A. 2C:25-17 et seq., bail may be set and a complaint-warrant may be issued pursuant to the procedures prescribed in R. 3:4-1(b).

(f) ... no change

Note: Adopted November 1, 1985 to be effective January 2, 1986; pagaraph (a) amended, paragraph (b) caption and text amended and new paragraphs (c) and (d) adopted November 2, 1987 to be effective January 1, 1988; caption amended, former paragraph (c) redesignatd paragraph (e), former paragraph (d) redesignated paragraph (f) and new paragraphs (c) and (d) adopted November 18, 1993 to be effective immediately; paragraphs (a), (b), and (e) amended to be effective .

H. Proposed Amendments to *R.* 5:8-1 – Investigation Before Award

Discussion

The statement of the Custody and Parenting Time Subcommittee with respect to this recommendation is as follows:

The Custody and Parenting Time Subcommittee of the Family Practice Committee met with and interviewed many mental health professionals who routinely perform custody and parenting evaluations for the Courts and litigants when parenting issues cannot be resolved by the parties. These experts uniformly agreed that it was inappropriate both to mediate a parenting dispute and to perform an expert custody/parenting evaluation at the same time. Our interactions with these mental health professionals confirmed our own experiences as lawyers and judges. Mediation is an attempt to encourage parties to be open and vulnerable and to compromise their differences so that the children are spared conflict and so that families implement their own plans for future parent/child relationships. However, litigants who are in the midst of participating in expert parenting/custody evaluations are advocates for their positions and guarded in furtherance of their attempts to achieve their objectives. Since the two processes are inconsistent, we believe that the parties involved in parenting disputes should not be compelled to participate in both while the mediation process is still viable. Mediators may not act as expert evaluators. *R.* 1:40-5(c). Therefore, evaluations are not continuations of the

mediation process, but rather the beginning of a new process. Our proposed Amendment to *R.* 5:8-1 makes clear that the parties shall not be compelled to participate in both processes at the same time, although they are not forbidden from doing so if they agree.

The Committee also is mindful of the policy emphasis that has been placed on prompt and expeditious conclusion of custody and parenting disputes. Therefore, the Committee believes an outside time limit must be established for mediation to be concluded successfully or stopped so that any formal expert evaluations contemplated may begin. For good cause shown, the Court may allow the parties to continue the mediation process if it believes there is a reasonable likelihood that its continuation will enable the parenting dispute to be successfully concluded by agreement.

A two month time period for mediation is proposed because the Court does not refer the case to mediation until it finds that a genuine and substantial issue of custody exists. Pursuant to Dissolution Standard 14B, such determinations are made at the first Case Management Conference. That Dissolution Standard and Rule Implementation Recommendation 15B of the Conference of Presiding Judges, set forth as follows:

> Unless there is a significant change is (sic) circumstances, the determination of a genuine custody dispute should be determined at the Case Management Conference and not be raised at a later date.

See Exhibit J contained within annexed Appendix A (Report of the Custody and Parenting Time Subcommittee).

The Committee is mindful that some litigants participate in mediation of custody and parenting disputes before the first Case Management Conference. In such instances, the mediation time period is intended to end two months after it actually begins, unless an extension is granted. Initial and subsequent Case Management Orders must make clear to litigants the mediation termination date, and any extensions of that date. A proposed amended form Case

Management Order, which adds a line pertaining to mediation dates, is annexed as Exhibit H contained within Appendix A (Custody and Parenting Time Subcommittee Report).

Moreover, pursuant to *R.* 5:5-6, Case Management Conferences are to be held within thirty (30) days after the expiration of the time for the last permissible responsive pleading. Therefore, the proposed Amendment recognizes that for approximately three to four months after the commencement of the case (assuming timely service), the parties are engaged in discussions between themselves, either informally or with the assistance of a Court appointed mediator, to attempt to resolve consensually the parenting dispute. However, the proposed Amendment makes clear that courts, during this period, have control of the case and may grant or withhold temporary relief by way of alimony, child support, and entry of orders pertaining to pendente lite parenting issues, in accordance with *R.* 5:5-4 and *R.* 5:7-2.

Proposed Rule Change

5:8-1. Investigation Before Award

In family actions where the court finds that the custody of children is a genuine and substantial issue the court shall refer the case to mediation in accordance with the provisions of R. 1:40-5. During the mediation process, the parties shall not be required to participate in custody evaluations with any expert, unless they agree to the contrary. The mediation process shall last no longer than two months from the date it commences, or is ordered to commence, whichever is sooner, unless the Court, on good cause shown, extends the time period. The Court shall identify the date for conclusion of mediation in its initial and subsequent Case Management Order(s). If the mediation is not successful in resolving custody issues, the court may before final judgment or order, require an investigation to be made by the county probation office of the character and fitness of the parties, the economic condition of the family and the financial ability of the party to pay alimony or support or both. In other family actions the court may, if the public interest so requires, order such an investigation. The court may continue any family action for

the purpose of such investigation, but shall not withhold the granting of any temporary relief by way of alimony, [or] support or [both] *pendente lite* orders pertaining to parenting issues under R. 5:5-4 and R. 5:7-2 where the circumstances require. Such investigation of the parties shall be conducted by the probation office of the county of venue, notwithstanding that one of the parties may live in another county, and the probation office shall file its report with the court no later than 45 days after its receipt of the judgment or order requiring the investigation, unless the court otherwise provides. Such investigation of the parties shall be conducted by the probation office of the county of the home state of the child, notwithstanding that one of the parties may live in another country or state.

Note: Source---R. (1969) 4:79-8(a). Adopted December 20, 1983, to be effective December 31, 1983; amended November 7, 1988 to be effective January 2, 1989; amended July 14, 1992, to be effective September 1, 1992; amended to be effective .

I. Proposed Amendments to *R.* 5:8-6 – Trial of Custody Issue

Discussion

The Custody and Parenting Time Subcommittee's discussion of proposed amended *R.* 5:8-1 sets forth the need to allow the parties time for mediation of a genuine and substantial custody dispute without participation in expert evaluations. Mediation and expert custody evaluations are very different processes and encourage and engender different litigant behavior.

Whether or not a custody dispute is genuine or substantial is not formally determined until the first Case Management Conference, which occurs no sooner than thirty (30) days after the filing of the last responsive pleading. See Dissolution Standard 14B, Exhibit J contained within attached Appendix A (Custody and Parenting Time Subcommittee Report.).

As set forth in the proposed amendment to *R.* 5:8-1, from such time, the parties have at least sixty (60) days within which to conduct mediation, without the need to participate in

evaluations, unless mediation started earlier. Therefore, the scheduling of a hearing date no later than three months after the last responsive pleading is unrealistic and unmanageable. The Special Matrimonial Commission Report (Special Committee Recommendation 39, Final Report of the Special Committee on Matrimonial Litigation, Page 157, the approved Dissolution and General Family Division Standard (14) and the Rule Implementation Recommendations of the Conference of Family Presiding Judges (15) sets forth that such a three month period for scheduling is unrealistic and unmanageable and that the time period should be increased to six months. See The Conference of Family Presiding Judges, The Family Division Report on Best Practices and Standardization to the Judicial Counsel, July 30, 1999.

The Committee believes that expeditious resolution of custody cases is important for children and parents. The parties must move on with their lives and the children must be spared even the short term conflict of litigation if at all possible. However, the Committee is also mindful that mental health professionals believe that a grieving process must occur in a divorce, as with a death. People are not always ready to move on so quickly and to compel them to do so may exacerbate hostilities between them because the emotions that led to the breakup may still be very raw with feelings of anger, jealousy and revenge dominating the family landscape. It is appropriate to allow a period of repose so that mediation may be processed. Mediation engenders different emotional responses than expert evaluations. Parties should be encouraged to identify and to mediate disputes about parenting issues as quickly as possible

Expansion of the custody hearing date from three to six months will give custody or probation evaluators up to three months within which to conduct their evaluations, following the termination of mediation, assuming the mediation time period is not extended for good cause shown. This proposed change also implements the recommendations of the Special Matrimonial Commission (Recommendation 39, Page 57, Report of the Special Commission, *supra*) and

Recommendation 15 of the Conference of Presiding Judges, that the time frame for scheduling custody trials be increased to six months. If the period of mediation is extended, there may be an impact on the Court's fixing of the hearing date, but this should not ordinarily occur. Early mediation should be helpful in controlling time delays.

The Committee is aware that a substantial dispute exists about whether judicial officers should interview children. By and large, mental health professionals do not believe that judicial officers should interview children, no matter how qualified they may be. Many mental health professionals believe that children who are interviewed by judges develop the fantasy that their comments were responsible for a Judge's decision about custody. That view was also expressed by Judge Kestin in his concurring opinion in *Mackowski v. Mackowski,* 317 *N.J. Super*. 8, 15 (App. Div. 1998).

The problem with child interviews is difficult. Legally, a child's preferences must be considered by a court when assessing custody. See *N.J.S.A.* 9:2-4. That statutory direction has been implemented by Court Rule that requires a court to interview children who are seven years of age or older and gives the court discretion not to do so if the children are beneath the age of seven. See *R.* 5:8-6.

However, the statute does not have the same direction. The statute does not require a court to interview a child of any age. The current version of *N.J.S.A.* 9:2-4 simply requires the court to consider the preference of a child when of sufficient age and capacity to reason so as to form an intelligent decision. The prior version of *N.J.S.A.* 9:2-4 required the trial judge to conduct the interview of the child and also "to give due weight to the child's preference". See *Lavine v. Lavine*, 148 *N.J. Super*. 267, 271 (App. Div. 1977). The statute does not require or entitle the child to a right to express an opinion to "the finder of fact and ultimate decision maker" as suggested in *Mackowski v. Mackowski,* 317 *N.J. Super*. 8, 12 (App. Div. 1998).

It is probably correct that few judges are equipped, regardless of their involvement in enhanced judicial training (See *Mackowski v. Mackowski, supra*. 317 *N.J. Super.* at 13), appropriately and effectively to interview a child without extreme discomfort being caused for

the child by virtue of either the awkwardness of the judge or the circumstances of the interview, e.g. courthouse atmosphere, in chambers, robes, abbreviated time frame.

We believe that mental health professionals are best trained to observe interaction between children and parents and to obtain information about the child's preferences. Despite the concerns in *Mackowski* that the reliance upon child interviews by experts will concede fact finding responsibility to another party, the Committee believes that experts' opinions about a child's preferences are never conclusive and are subject to cross examination and final determination by the Court. We also agree that the Court should not be deprived of the interview tool, and interaction with the child, if, in its discretion, it concludes that it wishes such interaction. Both views can be accommodated by making clear in the Rule that the court does not have to interview a child and that in its discretion, it may decline to do so, so long as its reasons for not doing so are stated.

Since the proposed rule amendment provides that a child interview will be discretionary with the court, we believe in fairness to the litigants, the court ordinarily should make its determination about conducting an interview reasonably before trial, unless there is good cause to do otherwise. In the past, if a child was seven or older, a litigant knew that upon request the court had to interview a child. Since a mandatory interview will no longer occur upon request, we believe fairness requires a court to announce its decision about interviewing reasonably before trial, unless there is good cause to do otherwise, such as evidence or testimony that is presented at trial.

Since the Rule is amended to give courts the discretion to interview children, the age distinction has been eliminated. The Committee believes that age is a factor which courts should consider when determining whether to exercise their discretion, and the Rules prior reference to the age of seven should be one factor considered.

Proposed Rule Changes

5:8-6. Trial of Custody Issue

Where the court finds that the custody of children is a genuine and substantial issue, the court shall set a hearing date no later than [3] 6 months after the last responsive pleading. The court may, in order to protect the best interests of the children, conduct the custody hearing in a family action prior to a final hearing of the entire family action. As part of the custody hearing, the court [shall] may on its own motion or at the request of a litigant conduct an interview with the child(ren) [if the child(ren) are age 7 or older. If the children are younger than age 7, then the court may, in its discretion, conduct such an interview]. Ordinarily, the decision about whether or not to conduct an interview shall be made reasonably before trial, unless there is good cause to do otherwise. If the court determines not to interview the child(ren), the court shall set forth on the record its reason for not doing so. [The court's] If the court chooses to interview the child(ren) it shall be in camera. A stenographic or recorded record shall be made of the entire interview. Transcripts thereof shall be provided to counsel and the parties upon request and payment for the cost. However, neither parent shall discuss nor reveal the contents of the interview with the children or third parties without permission of the court. Counsel shall have the right to provide the transcript or its contents to any expert retained on the issue of custody. If the court decides to interview children, [C] counsel shall have the right to submit to the court prior to the interview a list of questions which the court, in its discretion, may utilize during the interview. [If] Should the court elect[s] not to use any of the questions submitted by counsel, it shall set forth its reasons therefor on the record. Any judgment or order pursuant to this hearing shall be treated as a final judgment or order for custody.

J. Proposed Amendments to *R.* 5:12-4 4 – Closed Hearings *and* Proposed New Rule 5:9-4 – Relief from Judgment or Order

Discussion

The federal and State Adoption and Safe Families Act statutory enactments of the late 1990's provided a strong message to policy makers, judges, and practitioners that among the most important interests of children in the child welfare system is the need for a stable, permanent family environment to be established as expeditiously as possible, either through solving the problems in the family of origin or, when that fails, making a permanent adoptive placement or some reasonable alternative which meets the individual child's needs. It is only logical to conclude that laws which require a much speedier process for addressing these cases in the first place, with strictly enforced, shorter time frames for filing for and pursuing "permanency", assume as well that once judgments which prepare the way for adoption or other permanent status are entered, the final steps in the process will be undertaken without undue delay. Unfortunately, history has shown many cases where protracted uncertainty and chaos have been caused by the fact that ostensibly final orders terminating parental rights, in DYFS guardianship (FG) actions, remain unfulfilled or subsequent adoptions or other permanent placements are disrupted when motions to vacate termination judgments entered by default due to the non-participation or total of absence of the defendant parent have been brought pursuant to *R.* 4:50 months after the decision.

The Children-In-Court Subcommittee determined that this situation is inconsistent with the recent developments in New Jersey and federal laws and practices. Termination of parental rights judgments must achieve finality and become enforceable, meaning that the children involved can become part of adoptive families, or the statutory goal of "permanency" will become an impossibility. The fairly liberal standard for vacating default judgments and orders provided for in *R.* 4:50, in this specific context, works a severe detriment to the best interests of the children in these cases by bringing about a status of protracted impermanence, since any action pursuant to the termination, such as adoption, is in continuing jeopardy of being voided.

It is strongly recommended that a rule be adopted for this unique class of cases which would clarify that those particular orders would not be vulnerable to being disturbed for any longer than necessary to serve justice, in this instance 90 days, even more than the time period given time-honored recognition as reasonable for purposes of making a decision whether or not to appeal a final judgment or order. A new Rule in Part V would leave the applicability of *R.* 4:50 intact for other causes where its continuing viability is far less prone to working a grievous injustice by delaying or preventing permanence. To eliminate any confusion, both the Rule concerning termination of parental rights actions and the Rule concerning actions by the Division of Youth and Family Services are amended.

Proposed New Rule

5:9-4. Relief from Judgment or Order

Notwithstanding the provisions of R. 4:50, a motion for relief from a final judgment or order terminating parental rights, following a full hearing including the taking of evidence, shall be filed no later than 90 days following the entry of the order and may be granted only upon a showing by clear and convincing evidence of fraud, misrepresentation, or other misconduct of an adverse party.

Note: Adopted _____ to be effective _____.

Proposed Rule Change

5:12-4. Case Management Conference, Hearings, or Trial

(a) Prompt Disposition; Case Management Conference; Adjournments.

Upon the return date, the court shall proceed to hear the matter forthwith. In abuse and neglect cases, the court shall request that the parents or guardians at their first appearance in court provide identifying information regarding any persons who may serve as alternative placement

resources to care for the children. As soon as the litigants have retained counsel or have chosen to proceed pro se and no later than 30 days from the return date, the court shall hold a case management conference, and shall enter a case management order in the form set forth in Appendix X–A of these rules or in such other form as the court may direct. Thereafter, the court may on its own motion or that of any party, adjourn the matter from time to time as the interest of justice requires. The court may at any time enter such interim orders as the best interests of any child under its jurisdiction may require. Any order or judgment terminating parental rights and placing a child in the guardianship of the Division of Youth and Family Services shall be subject to the provisions of R. 5:9-4.

(b) . . . no change

(c) . . . no change

(d) . . . no change

(e) . . . no change

(f) . . . no change

(g) . . . no change

(h) . . . no change

(i) . . . no change

Note: Source–R. (1969) 5:7A–4. Adopted December 20, 1983, to be effective December 31, 1983; paragraphs (e) and (f) adopted November 5, 1986 to be effective January 1, 1987; paragraphs (a) and (b) amended July 13, 1994 to be effective September 1, 1994; paragraphs (a) and (b) amended June 28, 1996 to be effective September 1, 1996; paragraph (g) adopted July 10, 1998 to be effective September 1, 1998; new paragraphs (h) and (i) adopted July 5, 2000 to be effective September 5, 2000; paragraph (a) amended to be effective .

K. Proposed Amendments to *R.* 5:17-4 – Closed Hearings

The Subcommittee on Juvenile Matters continued to discuss, throughout the current cycle, the issue relating to confidentiality in Juvenile Delinquency and Juvenile-Family Crisis proceedings. The Subcommittee is recommending changes to *R.* 5:17-4 and *R.* 5:19-2. These

proposed changes were submitted by the Juvenile Subcommittee of the Conference of Family Division Presiding Judges to the Conference of Family Division Presiding Judges and the Conference approved the recommendations. Both rules are being revised in order to alleviate confusion with regard to the statutory provisions on confidentiality, and to conform with current statutes *N.J.S.A.* 2A:4A-60 to -62.

Discussion

Currently, *R.* 5:17-4 does not address the issue of records. *N.J.S.A.* 2A:4A-60a specifically addresses the issue of the release of records found to be part of a juvenile-family crisis. It indicates what records are to be safeguarded from public inspection and indicates to whom such records shall be made available, including "[a]ny person or agency interested in a case or in the work of the agency keeping the records, by order of the court for good cause shown." The rule, therefore, should be amended to reflect which records should not be made public, and, that they can be made available only pursuant to *N.J.S.A.* 2A:4A-60 to 62 inclusive.

Proposed Rule Changes

Rule 5:17-4. Closed Hearings; Records

(a) Hearings. Every hearing shall be conducted in private with only such persons in attendance as have a direct involvement in the proceedings, except as hereinafter provided. At the judge's discretion, attendance may also be permitted at any private hearing of any person who has an interest in the work of the court; provided, however, that such person shall agree not to record, disclose or publish the names, photographs or other identifying data with respect to any of the participants in the hearing. Upon objection by any family member involved in the hearing or by the attorney of any family member, any person seeking permission to attend

because of interest in the work of the court may be excluded from any hearing involving said juvenile.

(b) Records. Social, medical, psychological, legal and other records of the court or family intake services, and records of law enforcement agencies, found to be part of a juvenile-family crisis matter, shall be strictly safeguarded from public inspection and shall be made available only pursuant to N.J.S. 2A:4A-60 to 62, inclusive. Any other application for such records shall be by motion to the court.

Note: Source – R. (1969) 5:9-1. Adopted December 20, 1983, to be effective December 31, 1983; amended July 13, 1994 to be effective September 1, 1994; original rule redesignated as paragraph (a) hearings, new paragraph (b) records adopted to be effective

L. Proposed Amendments to *R.* 5:19-2 – Confidentiality of Hearings and Records

See introductory comment by the Juvenile Subcommittee in paragraph K, above.

Discussion

There are confidentiality provisions in juvenile delinquency cases for both disclosure of records (*N.J.S.A.* 2A:4A-60a) and attendance at hearings (*N.J.S.A.* 2A:4A-60i). However, the rule (*R.* 5:19-2) needs to be amended to reflect the provisions as set forth in the statute in order to alleviate confusion. The proposed changes that are recommended include a change to paragraph (a) "that there is no substantial likelihood of specific harm to the juvenile" from permitting public attendance at a hearing. This section regarding victim attendance and participation has generally been well received. There have been problems, however, when dispositions have been postponed to accommodate a victim or victim's family member being able to attend. While this is often readily accomplished there have been occasions when a pending dispositional option (e.g., residential program) might be jeopardized by any postponement. Thus, this provision would be revised to allow the court discretion in determining whether "exigent circumstances"

would require the disposition hearing to proceed without additional adjournment. With regard to records, currently, *R.* 5:19-2(b), as to delinquency cases, does address the issue of confidentiality of records, but it does so by referring back to the criteria in specific statutory provisions (*N.J.S.A.* 2A:4A-60 to -62), and not by specifying the form or nature of any other application for such records. Therefore, a recommendation will be made to indicate that such application will be made on motion to the court.

Proposed Rule Changes

Rule 5:19-2. Confidentiality of Hearing and Records

(a) Hearing

(1) The court may, upon application by the juvenile or the juvenile's parent or guardian, the prosecutor or any other interested party, including the victim or complainant or members of the news media, permit public attendance during any court proceeding [at] in a delinquency case, where it determines that there is no substantial likelihood [that] of specific harm to the juvenile [would result].

(2) Unless such application is made and granted, every hearing shall be conducted in private with only such persons in attendance as have a direct involvement in the proceeding, except as hereinafter provided. At the judge's discretion, attendance may also be permitted at [any] such private hearing [of] by any person who has an interest in the work of the court, provided, however, that such person shall agree not to record, disclose or publish the names, photographs or other identifying data with respect to any of the participants in the hearing except as expressly authorized by the judge. Upon objection by the juvenile, the juvenile's attorney or the juvenile's parents, guardian or custodian, any person seeking permission to attend because of interest in the work of the court may be excluded from any hearing involving said juvenile.

(3) The court shall permit a victim or a family member of a victim to make a statement prior to ordering a disposition in any delinquency proceeding involving an offense that would constitute a crime if committed by an adult, subject to a court determination that exigent circumstances exist which require an immediate disposition.

(b) Confidentiality of Records. Social, medical, psychological, legal and other records of the Court, Probation [Department] Division and law enforcement agencies pertaining to juveniles charged as delinquents shall be strictly safeguarded from public inspection and shall be made available only pursuant to N.J.S. 2A:4A-60 to 62, inclusive. Any other application for such records, or to resist disclosure of same, shall be made by motion to the court.

Note: Source—R. (1969) 5:9-1(a), 5:10-7. Adopted December 20, 1983, to be effective December 31, 1983; paragraph (a) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) is amended, new paragraph (a)(3) adopted, paragraph (b) amended to be effective _____.

M. Proposed Amendments to *R.* 5:22-2 – Referral Without Juvenile's Consent

Discussion

N.J.S.A. 2A:4A-26 provides for referral of a juvenile case to adult court without the juvenile's consent. This procedure is commonly known as involuntary waiver. In an involuntary waiver proceeding, the Family Court makes a determination to waive its exclusive jurisdiction over the juvenile, allowing the juvenile to be tried as an adult. Under the New Jersey Code of Criminal Justice, a juvenile may not be tried and convicted in Criminal Court unless the Family Court waives its jurisdiction over the matter. *N.J.S.A.* 2C:4-11.

On January 14, 2000, *P.L*. 1999, *c.* 373 was enacted, amending *N.J.S.A.* 2A:4A-26. It changes the procedure for involuntary waiver in certain designated cases. The amendments became effective on March 14, 2000, 60 days after enactment.

Prior to the amendments, a prosecutor seeking the waiver of a juvenile offender was required to file a motion showing that the juvenile was 14 years of age or older, that there was probable cause to believe that the juvenile had committed certain offenses and that the interests of the public required waiver. (Certain offenses were designated as serious enough to always be in the public interest to require waiver. Stated differently, there was a presumptive involuntary waiver of Chart I offenses. For others, the prosecutor had to demonstrate that the offense was "sufficiently serious that the interest of the public required waiver.") In order to defeat a waiver motion, a juvenile was required to show that there was both a probability of rehabilitation by the use of the procedures, services and facilities available to the court prior to the juvenile reaching the age of 19 and that the probability of rehabilitation substantially outweighed the reasons for waiver.

P.L. 1999, *c.* 373 "…broadened the class of offenders eligible for waiver and revised the standards for waiver in certain cases. A very significant change in the waiver standard was made with respect to certain serious juvenile offenders. For this group, it was the Legislature's intention to shift the process toward waiver." *In the Matter of Registrant J.G.*, 169 *N.J.* 304 (2001). Specifically, the amendments eliminate the opportunity for juveniles aged 16 and over, who are charged with the most serious offenses, to defeat a waiver motion by demonstrating to the Family Court that he or she can be rehabilitated by the age of 19. In effect, this has created a group of offenders subject to "prosecutorial" discretion. For these offenders, once probable cause as to the Chart I offense has been established, no additional showing is required in order for waiver to occur. For this group of cases, the legislature intended to "ease[s] conditions for trial of certain juvenile offenders as adults." *Statement to Senate No. 286*, 1999. There was, however, an exception created for this age group (16 and over) when the offense in question is a

violation of *N.J.S.A.* 2C:35-5 (Manufacturing, Distributing or Dispensing Narcotics) and which involves distribution for pecuniary gain while in a school zone. This narrowly limited group of cases continue to be controlled by the same standard that applies to 14 and 15 year olds in Chart I cases.

The proposed rule amendments incorporate the amendments of the waiver statute. It is not the Committee's intent to create any new rights or obligations not already existing under the current statute and case law.

The Committee has also reorganized the rule, creating four new subparagraphs, in order to better illustrate the differing requirements for waiver.

- Subparagraph (1) describes those Chart II offenses (for juveniles age 14 through 17) in which the State must establish probable cause and demonstrate that the interests of the public require waiver. However, waiver will not be granted if the juvenile can show that the probability of his/her rehabilitation prior to reaching the age of 19 substantially outweighs the reasons for waiver.

- Subparagraph (2) describes those Chart I offenses (for juveniles age 14 and 15) in which the State must establish probable cause, however, no additional showing that the interests of the public require waiver is needed. Thus, probable cause alone creates a rebuttable presumption in favor of waiver, unless the juvenile can demonstrate that the probability of his/her rehabilitation prior to reaching the age of 19 substantially outweighs the reasons for waiver.

- Subparagraph (3) describes those Chart I offenses (for juveniles age 16 and 17) in which the State must demonstrate probable cause alone. No further showing is necessary

and there is no opportunity for the juvenile to offer evidence of his/her amenability to rehabilitation.

· Subparagraph (4) describes an exception to subparagraph (3), where a 16 or 17 year old is charged with a violation of *N.J.S.A.* 2C:35-5 (Manufacturing, Distributing or Dispensing Narcotics) and which charge involves distribution for pecuniary gain on or within 1,000 feet of school property. These juveniles would be treated similar to those in subparagraph (2). Therefore, the State must establish probable cause and no additional showing that the interests of the public require waiver is needed. Thus, probable cause alone creates a rebuttable presumption in favor of waiver, unless the juvenile can demonstrate that the probability of his/her rehabilitation prior to reaching the age of 19 substantially outweighs the reasons for waiver.

Proposed Rule Changes

5:22-2. Referral Without Juvenile's Consent

(a) … no change

[(b) Standards for Referral. The court shall waive jurisdiction of a juvenile delinquency action without the juvenile's consent and shall refer the action to the appropriate court and prosecuting authority having jurisdiction only upon the following findings:

(1) The juvenile was 14 years of age or older at the time of the alleged delinquent act; and

(2) There is probable cause to believe that the juvenile committed a delinquent act or acts which if committed by an adult would constitute

(A) criminal homicide other than death by auto, robbery which would constitute a crime of the first degree, aggravated sexual assault, sexual assault, aggravated assault which would

constitute a crime of the second degree, kidnapping or aggravated arson or an attempt or conspiracy to commit any of these crimes; or

(B) a crime committed at a time when the juvenile had previously been adjudicated delinquent, or convicted, on the basis of any of the offenses enumerated above; or

(C) a crime committed at a time when the juvenile had previously been sentenced and confined in an adult penal institution; or

(D) an offense against a person committed in an aggressive, violent and willful manner, other than an offense enumerated in this section, or the unlawful possession of a firearm, destructive device or other prohibited weapon, or arson or death by auto if the juvenile was operating the vehicle under the influence of an intoxicating liquor, narcotic, hallucinogenic or habit producing drug; or an attempt or conspiracy to commit any of these crimes; or

(E) a violation of N.J.S. 2C:35-3, 2C:35-4, or 2C:35-5, or an attempt or conspiracy to commit any of these crimes; or

(F) crimes which are part of a continuing criminal activity in concert with two or more persons and the circumstances of the crimes show the juvenile has knowingly devoted himself or herself to criminal activity as a source of livelihood; or

(G) theft of an automobile; and

(3) The nature and circumstances of the charge or the prior record of the juvenile are sufficiently serious that the interests of the public require waiver except that such showing shall not be necessary if the conduct charged is encompassed by subparagraph R. 5:22-2(b)(2)(A); and

(4) The juvenile has failed to show that the probability of rehabilitation prior to his reaching the age of 19 by the use of the procedures, services and facilities available to the court substantially outweighs the reasons for waiver.]

(b) Standards for Referral. The court shall waive jurisdiction of a juvenile delinquency action without the juvenile's consent and shall refer the action to the appropriate court and prosecuting authority having jurisdiction under the following circumstances:

(1) Judicial Discretion for Juveniles Aged 14 or Older and Charged with a Chart II Offense. The juvenile must be 14 years of age or older at the time of the alleged delinquent act and there must be probable cause to believe that he or she committed a delinquent act which if committed by an adult would constitute

A. a crime committed at a time when the juvenile had previously been adjudicated delinquent, or convicted of

1. criminal homicide, other than death by auto; or

2. strict liability for drug induced deaths (N.J.S. 2C:35-9); or

3. first degree robbery; or

4. carjacking; or

5. aggravated sexual assault; or

6. sexual assault; or

7. second degree aggravated assault; or

8. kidnapping; or

9. aggravated arson; or

10. an attempt or conspiracy to commit any of these crimes; or

B. a crime committed at a time when the juvenile had previously been sentenced and confined in an adult penal institution; or

C. an offense against a person committed in an aggressive, violent and willful manner, other than a Chart I offense enumerated in N.J.S. 2A:4A-26a. (2)(a); or the unlawful possession

of a firearm, destructive device or other prohibited weapon; or arson; or death by auto if the juvenile was operating the vehicle under the influence of an intoxicating liquor, narcotic, hallucinogenic, or habit producing drug; or an attempt or conspiracy to commit any of these crimes; or

D. a violation of N.J.S. 2C:35-3 (Leader of a Narcotics Trafficking Network), N.J.S. 2C:35-4 (Maintaining and Operating a CDS Production Facility), N.J.S. 2C:35-5 (Manufacturing, Distributing or Dispensing Narcotics), or an attempt or conspiracy to commit any of these crimes; unless the violation, attempt or conspiracy involves the distribution for pecuniary gain of any controlled dangerous substance or controlled substance analog while on any school property or within 1,000 feet of such school property; or

E. crimes which are part of a continuing criminal activity in concert with two or more persons and where the circumstances of the crimes show the juvenile has knowingly devoted himself to criminal activity as a source of livelihood; or

F. theft of an automobile.

Upon a finding of probable cause for any of the offenses enumerated above, the burden is on the prosecution to show that the nature and circumstances of the charge or the prior record of the juvenile are sufficiently serious that the interests of the public require waiver. However, waiver shall not be granted if the juvenile can show that the probability of his/her rehabilitation by the use of the procedures, services and facilities available to the court prior to reaching the age of 19 substantially outweighs the reasons for waiver.

(2) Judicial Discretion for Juveniles Aged 14 or 15 and Charged with a Chart I Offense or with Certain Drug Offenses Committed Within a School Zone. The juvenile must be 14 or 15

years old at the time of the alleged delinquent act and there must be probable cause to believe that he or she committed a delinquent act which if committed by an adult would constitute

A. criminal homicide, other than death by auto; or strict liability for drug induced deaths; or first degree robbery; or carjacking; or aggravated sexual assault; or sexual assault; or second degree aggravated assault; or kidnapping; or aggravated arson; or an attempt or conspiracy to commit any of these crimes, or

B. possession of a firearm with a purpose to use it unlawfully against the person of another under subsection a. of N.J.S. 2C:39-4; or possession of a firearm while committing or attempting to commit aggravated assault, aggravated criminal sexual contact, burglary or escape; or

C. a violation of N.J.S. 2C:35-3 (Leader of a Narcotics Trafficking Network), N.J.S. 2C:35-4 (Maintaining and Operating a CDS Production Facility), N.J.S. 2C:35-5 (Manufacturing, Distributing or Dispensing Narcotics), or an attempt or conspiracy to commit any of these crimes; and which violation, attempt or conspiracy involves the distribution for pecuniary gain of any controlled dangerous substance or controlled substance analog while on any school property or within 1,000 feet of such school property.

Upon a finding of probable cause for any of these enumerated offenses, there is a rebuttable presumption that involuntary waiver will occur. The juvenile can rebut this presumption only by demonstrating that the probability of his or her rehabilitation by the use of the procedures, services and facilities available to the court prior to reaching the age of 19 substantially outweighs the reasons for waiver.

(3) Prosecutorial Discretion for Juveniles Aged 16 or Older and Charged with a Chart I Offense. The juvenile must be 16 years of age or older at the time of the alleged delinquent act

and there must be probable cause to believe that he or she committed a delinquent act which if committed by an adult would constitute

A. criminal homicide, other than death by auto; or strict liability for drug induced deaths; or first degree robbery; or carjacking; or aggravated sexual assault; or sexual assault; or second degree aggravated assault; or kidnapping; or aggravated arson; or

B. possession of a firearm with a purpose to use it unlawfully against the person of another under subsection a. of N.J.S. 2C:39-4; or possession of a firearm while committing or attempting to commit aggravated assault, aggravated criminal sexual contact, burglary or escape; or

C. a violation of N.J.S. 2C:35-3 (Leader of a Narcotics Trafficking Network); or N.J.S. 2C:35-4 (Maintaining and Operating a CDS Production Facility); or N.J.S. 2C:39-4.1 (Weapons Possession while Committing Certain CDS Offenses).

Upon a finding of probable cause for any of these enumerated offenses, no additional showing is required in order for waiver to occur. Jurisdiction of the case will be immediately transferred.

(4) Judicial Discretion for Juveniles Aged 16 or 17 and Charged with Certain Drug Offenses Committed Within a School Zone. The juvenile must be 16 years of age or older at the time of the alleged delinquent act and there must be probable cause to believe that he or she committed a delinquent act which if committed by an adult would constitute

A. a violation of N.J.S. 2C:35-5 (Manufacturing, Distributing or Dispensing Narcotics), or an attempt or conspiracy to commit this crime; and which violation, attempt or conspiracy involves the distribution for pecuniary gain of any controlled dangerous substance or controlled substance analog while on school property or within 1,000 feet of such school property.

Upon a finding of probable cause for any such offense, there is a rebuttable presumption that involuntary waiver will occur. The juvenile can rebut this presumption only by demonstrating that the probability of his or her rehabilitation by the use of the procedures, services and facilities available to the court prior to reaching the age of 19 substantially outweighs the reasons for waiver.

(c) … no change

(d) … no change

Note: Source--R. (1969) 5:9-5(b), (c). Adopted December 20, 1983, to be effective December 31, 1983; paragraph (b)(2)(E) amended July 14, 1992 to be effective September 1, 1992; paragraphs (a), (b)(2)(F) and (b)(4) amended July 13, 1994 to be effective September 1, 1994; paragraphs (a) and (b)(2)(D), (E) and (F) amended, paragraph (b)(2)(G) adopted June 28, 1996 to be effective September 1, 1996; paragraph (b) eliminated, new paragraph (b), subparagraphs (1), (2), (3) and (4) adopted to be effective .

II. Proposed New Rules for Adoption

A. Proposed *R.* 5:9-4 – Relief from Judgment or Order

Addressed above in Paragraph I (Subparagraph K).

B. Proposed *R.* 5:9A – Actions for Kinship Legal Guardianship

Discussion

On October 11, 2001, New Jersey enacted P.L.2001, c.250, which establishes kinship legal guardianship, a new status of permanent placement of children with a caregiver who is a relative or a certain defined "family friend", someone with whom the child has a positive psychological or emotional relationship. This new law provides for financial assistance for kinship caregivers who have heretofore been unable to obtain any help, often meaning that the family members have had to make heavy sacrifices or placements have failed and children have been removed.

In addition to adding this new legal status for families who have historically provided care for relatives' children, the new law also establishes a legal status of guardianship which does not require termination of parental rights but which meets the requirement of the Adoption and Safe Families Act for an alternative permanent placement. This new law will necessitate the establishment of new procedures for the Family Part and may well require new or changed Rules. Due to the late enactment of the new statutory scheme, in addition to the proposed Rule, below, establishing the new category of cases, the Family Practice Committee and Sub-committee will undertake review for any needed additional Rule recommendations.

Proposed New Rule

5:9A. Actions for Kinship Legal Guardianship

5:9A-1 An action seeking the establishment of a kinship legal guardianship relationship, pursuant to P.L.2001, c.250 (C:3B:12A-1 *et seq.*) shall proceed in accordance with the act and with procedures and forms promulgated by the Administrative Director of the Courts.

Note: Adopted _____ to be effective _____.

III. Proposed Amendments Considered and Rejected

A. Proposed Amendments to *R.* 5:8-6 – Trial of Custody Issues

At the final meeting of the Supreme Court Practice Committee, the consensus was that to add factors in the rules for consideration by the court in custody matters was not appropriate. A further discussion of this issue is contained in the Final Report of the Custody and Parenting Time Subcommittee, annexed here as Appendix A, which was the result of an extensive study of the custody statutes of other states.

IV. Other Recommendations

A. Comprehensive Judicial Orientation Program

The Report of the Judicial Education Subcommittee (a joint subcommittee of the Supreme Court Family Practice Committee and Conference of Family Division Presiding Judges), annexed here as Appendix B, consists of a Comprehensive Judicial Orientation Program. This report was approved by the Supreme Court Family Practice Committee at its final meeting.

This report was further approved by the Conference of Family Division Presiding Judges at its December 19, 2001 meeting and will ultimately be submitted to the Judicial Council for final approval.

B. Standardization of Time for MESP Programs

The General Procedures and Rules Subcommittee notes that there is a lack of uniformity in the timing in which Matrimonial Early Settlement Panel (MESP) hearings take place on a vicinage by vicinage and sometimes on a county by county basis. The Subcommittee recognizes that, in part, this might be caused by the fact that trial backlogs are greater in some vicinages than in other vicinages. The Subcommittee's consensus was that MESP hearings should take place no later than eight months after the filing of the complaint. The Subcommittee offers this commentary understanding that no change in Court Rules or issuance of a directive would be necessary.

In making this recommendation, the Subcommittee specifically acknowledges that there need not be a "one size fits all" policy with respect to the calendaring of the MESP program, although there should be deference paid to the second work in the MESP designation.

For the MESP to achieve its true potential in aiding the bar and public in settling matrimonial cases, Matrimonial **Early** Settlement Panel Hearings should be held as early as practicable recognizing the need for discovery to have taken place. The goal should be to restore the **Early** settlement concept. The eight month time frame is recommended only as an "outer target" for all cases other than the most complex. There should be flexibility and in those vicinages where realistically the hearing could take place sooner, this should happen.

The recommendation made here is entirely consistent with the laudatory "best practices" goal that all dissolution cases should be concluded within one year of filing.

The Subcomittees's Non-Rule Recommendation with respect to this is as follows:

> **On a state-wide basis, recognizing the goal that all divorce cases should be concluded within one year of filing, there should be a Matrimonial Early Settlement Panel hearing in all cases no later than eight months following the filing of the complaint.**

C. Pilot Program for Mediation of Economic Aspects of Family Law Cases

The General Procedures and Rules Subcommittee notes that the Supreme Court Complementary Dispute Resolution (CDR) Committee, Subcommittee on Family Programs and a majority of the full CDR Committee adopted the Subcommittee's recommendation that would terminate the pre-MESP pilot programs that had been in effect in Union, Burlington and Atlantic counties and that portion of the Ocean County Pilot Program that addressed pre-MESP cases, recommending that those counties should joint Bergen, Somerset and Morris Counties functioning as pilot programs limited to post-MESP cases. It is understood that the CDR Committee's Family Programs Subcommittee and the full CDR Committee had concluded that the statistics being maintained of the pilot programs do not support continuation of the economic mediation pilot program in the pre-MESP counties. This issue was reported to the full Supreme

Court Family Division Practice Committee at its meeting of October 30, 2001. Unanimously, the full Committee determined that it had no objection to the recommendation made by the CDR Committee.

On December 18, 2001, the Supreme Court ordered that Appendix XIX of the Court Rules ("Guidelines for Pilot Program Mediation of Economic Aspects of Family Law") be amended as reflected in Appendix C, annexed hereto. The recommendation of the CDR Committee was accepted by the Supreme Court and all of the pilot counties will be referring the cases at the post-MESP stage, effective January 1, 2002. Further, the pilot program has been extended through August 31, 2002.

D. Mandatory Tentative Dispositions

The General Procedures and Rules Subcommittee notes that the existing *Rule* 5:5-4(e) is not mandatory, but instead leaves to the discretion of the individual Family Part Judge whether a tentative disposition will be issued. Although the Subcommittee recognizes the merits of the tentative disposition process, no recommendation is now made for making the Rule mandatory.

The Subcommittee's Non-Rule Recommendation with respect to this is as follows:

> **No change is recommended to R. 5:-4(e). Whether or not a tentative disposition should be released should rest within the discretion of the Individual Family Part Judge and subject to the general supervision of the Family Presiding Judge of the vicinage.**

E. Tracking Disclosure Statements

It has been reported to the General Procedures and Rules Subcommittee that in some counties a "tracking disclosure statement" is required to be submitted to the court at the time of the filing of the complaint for divorce. The Subcommittee recommended that this practice should be eliminated in all counties which are requiring same. Practice in all counties should be

uniform. This topic should be referred to the Conference of Presiding Family Part Judges for implementation of the recommendation. Local practice rules including local practice requirements, should be discouraged.

The Subcommittee's Non-Rule Recommendation with respect to this is as follows:

> **The matter of tracking disclosure statements Should be referred to the Conference of Family Presiding Judges. Non-Rule local Practices should be discouraged.**

F. Statement Concerning *Crews v. Crews*, 164 *N.J.* 11 (2000)

Most of the efforts of the General Procedures and Rules Subcommittee during the 2000-2002 rules Cycle were devoted to the study of *Crews v. Crews*, 164 *N.J.* 11 (2000) and the preparation of a Revised Statement designed to assist the Family Part bench as it implements the mandates of the *Crews* opinion. On June 14, 2001, the Subcommittee presented to the full Committee its final report, which this full Committee then approved for referral to the Supreme Court. The Subcommittee's June 14, 2001 report built upon the "Preliminary Statement Concerning *Crews v. Crews* issued in July 2000. A copy of the Subcommittee's report dated June 14, 2001 is attached hereto as Appendix D.

The Conference of Family Division Presiding Judges considered the Revised Statement Concerning *Crews* at its December 19, 2001 meeting. Judge Koblitz noted her dissent with respect to the Revised Statement pursuant to her letter to Judge Serpentelli dated June 8, 2001 which is annexed hereto as part of Appendix D. A motion was made at that meeting to approve the *Crews* Statement with the objections made by Judge Koblitz as an exception to that recommendation. The result was that half were in favor and half were opposed. It was agreed that the Presiding Judges would speak to their dissolution judges and report back at their January 23, 2002 meeting.

G. Case Management or Standard Operating Procedures for Handling Domestic Violence Contempt Matters.

The Domestic Violence Subcommittee met several times to discuss the concerns regarding the screening, scheduling and processing of domestic violence contempt complaints. The Subcommittee reviewed the sections of the Domestic Violence Procedures Manual that pertain to the processing of domestic violence contempt matters, reviewed family division survey results regarding the processing of these cases, several different statistical reports from the AOC regarding the length of time it takes to schedule and dispose of these cases, the report of the FV/FO Committee of the Family Division Managers, the interim report of the past Domestic Violence Subcommittee and the Model Criminal Justice System Response to Domestic Violence by the Pro Prosecution Task Force of the New Jersey Advisory Council on Domestic Violence. Judge Ross also provided his insight from his technical assistance team visits to each of the county family divisions to review the entire domestic violence process. A contempt charge can be either indictable or non-indictable and until screened, cases should not be assumed to be one or the other.

In March of this year, the Division of Criminal Justice held a meeting of the assistant prosecutors that handle the domestic violence cases in each of the county prosecutor=s offices. At the meeting, Laura Hook, Esq., Chair of the Subcommittee brought this issue to attention of the assistant prosecutors and explained that there was serious concern regarding the processing of domestic violence cases since there was no uniform state procedure being followed in every county. It was also explained that as a result of various factors these cases were often delayed in being screened as indictable or non-indictable. This results in a delay in the forwarding of these cases to either the criminal or family division and thus delays the time it takes to dispose of these cases. The assistant prosecutors agreed that the delay and lack of uniformity was of great

concern. Delay often resulted in cases not being able to be prosecuted due to the victim becoming more and more reluctant to proceed the longer it took to process cases. The assistant prosecutors were able to identify the delay as stemming from several areas. These included: complaints and all accompanying reports not being promptly forwarded by the police, cases being split between the criminal and family divisions causing the domestic violence cases to be mixed in with all other criminal complaints delaying screening and scheduling, the lack of a public defender, lack of pretrial conferences, and the delay between the initial appearance in Family Court and the scheduling of cases.

After a review of all of the information and discussion, the Subcommittee determined that several important issues had to be considered in developing a uniform procedure that would provide for not only a prompt handling of these cases without straining judicial resources, but also would not compromise victim safety, offender accountability and due process. The Subcommittee decided that due to the fact that domestic violence cases are a complex specialized caseload requiring specific knowledge of the dynamics of domestic violence and the domestic violence law, the fact that all prosecutor=s offices have at least one assistant prosecutor designated to handle domestic violence cases in Family Court, Family Court staff is trained in domestic violence and has immediate access to the Family Court files, that cases could be more expeditiously screened and processed if the Family Division initially handled the bail setting during court hours, bail reviews and initial appearances. The statistics show that other than contempt cases that involve aggravated assault and other serious indictable charges, the vast majority of contempt cases involve a fourth degree contempt and disorderly persons simple assault and are in fact downgraded and heard in Family Court. The statistics also show that currently more than half of the counties utilize the Family Court domestic violence staff, judges

and prosecutors to handle the bail and initial appearances. The initial handling of domestic violence cases by Family Court staff, judges and prosecutors is in conformity with the national trend of specialized domestic violence courts and prosecution units which have resulted in the reduction in domestic violence homicides and the recidivism rate.

Therefore, the subcommittee recommends the following procedures:

a) Scheduling in the Family Division of the first appearance/arraignment/case management conference no later than 20 days of the issuance of a contempt complaint. If the defendant is in custody the first appearance must be scheduled within 72 hours in accordance with Court *Rule* 3:4-2. This would then require local law enforcement to promptly forward the complaints and police reports to the Prosecutor and Family Division. The specific time frames for forwarding complaints and scheduling of first appearance/arraignments should be developed and implemented by the Prosecutor, Family Division Presiding Judge, and the Family Division Manager in each county. Upon arrest, defendants should be given a Notice to Appear with the date for the first appearance /arraignment. Thus, if the defendant posts bail the defendant is already advised of court date of the first appearance /arraignment.

b) An assistant prosecutor should be required to appear at the first appearance /arraignment and specifically inform the court whether the case is being referred to the Criminal Division as an indictable case or downgraded to be heard in the Family Division. This would ensure prompt screening of contempt cases and referral to either the Criminal or Family Division within 20 days of the issuance of a contempt complaint. This decision must be noted on the CDR (complaint).

c) If the case is referred to Family Division, the 5A-process could be completed, counsel appointed and a pretrial conference scheduled at the first appearance /arraignment. These cases would then be docketed in FACTS. This procedure should avoid docketing of cases in the improper court division. Once referred to the Family Division, there would still be sufficient time to dispose of cases by trial or plea within the current 90 day time to disposition guideline.

d) In cases where the defendant has not been arrested at the time the contempt complaint is filed, the prosecutor should review and screen the complaint within 25B30 days of the issuance of the complaint. If the case is referred to the Family Division, a first appearance /arraignment/case management conference should be scheduled within 20 days of the referral. Notice of the court date should be sent to the defendant by Family Division staff.

e) In some counties, local law enforcement consults with an assistant prosecutor regarding the contempt and any additional charges. This provides a form of initial screening and ensures appropriate charges are filed. It is recommended that this procedure be adopted in counties that do not currently utilize this procedure. This should expedite the review and screening decision by the prosecutor appearing at the first appearance /arraignment.

f) In accordance with Court *Rule* 3:26-2, bail must be set on a contempt charge by a Superior Court Judge. It is recommended that during court hours, bail be set by Family Division Judges. Family Division Judges are most familiar with the domestic violence process and may have particular knowledge of a specific case. Family Court staff is more familiar with the FACTS system for obtaining domestic violence information and has immediate access to Family Division files.

Implementation of these procedures would provide local flexibility to allow for most effective use of local resources while ensuring a degree of statewide consistency in the screening and processing of contempt cases in a direct and timely fashion. Cases would be quickly referred to the appropriate court division and if referred to the Family Division could easily be handled within the 90 day disposition guideline.

The subcommittee recommends that if these procedures are endorsed by the Family Practice Committee, that they be referred to the appropriate Judge Conference and the Statewide Domestic Violence Working Group for inclusion in the Domestic Violence Procedures Manual.

This proposal was approved by the Supreme Court Family Practice Committee at the final meeting on December 4, 2001.

H. Conflict Between Appointment of Guardian ad litem and Counsel for Child

The Children-in-Court Subcommittee was designated to review a letter sent to the Family Practice Committee Chair by Marty M. Judge, Esq., outlining a case in which there was some confusion and concern arising apparently from interpretations between *Rules* 5:8A and 5:8B, Appointment of Counsel for Child and Appointment of Guardian ad Litem, respectively. There was a substantial discussion of the issue raised, with the result that the members of the Subcommittee agreed that the two rules do, in fact, describe different functions and distinct obligations. It was the unanimous thinking of those present that while attorneys frequently are appointed to serve as guardians ad litem, a qualified non-lawyer could be and often is appointed to serve in that role as well, and there is nothing in the text of either Rule which clouds the clear distinction between the counsel role of providing legal representation of a child's interests and the guardian ad litem's duty to the court of investigating, inquiring, and presenting as a witness fact-findings and conclusions to the court. Consequently, the Subcommittee drafted a response

to the writer stating its considered opinion that the circumstances he outlined were unique and would not justify amending either rule.

I. Modification of Child Support Orders in Domestic Violence Matters

The Child Support Subcommittee is pleased to report that the issue of modification of Child Support Orders in Domestic Violence Matters was addressed by the Conference of Family Presiding Judges. The Conference recommended that the Child Support Hearing Officer Program Standards revise Standard 7 to permit the Child Support Hearing Officers to hear child support modifications in domestic violence matters. Standard 7 has been reviewed and approved by the Judicial Council. Currently, review by the New Jersey Bar Association, Legal Services of New Jersey, and the New Jersey Department of Human Services is pending. It is anticipated that final approval is expected in the winter of 2002. The Child Support Hearing Officer Program will be training staff regarding domestic violence issues and dynamics in January and February, 2002. Ultimately, the Domestic Violence Procedures Manual will be revised to reflect this change.

V. Matters Held for Future Consideration

A. Financial Aspects of Divorce

The Report of the Financial Aspects of Divorce Subcommittee is as follows:

Sound jurisprudence, ABA-approved trial court performance standards and prevailing public policy contemplate some consistency of result in the delivery of justice. While the concept of equity mandates that particular facts and circumstances temper and mold what would otherwise be merely a mechanically uniform result, the starting points for equitable considerations on a given issue should have some common ground. That commonality should exist, regardless of the particular courthouse in which, or judge before whom, a litigant appears.

Alimony is the single financial aspect of divorce least favored by any significant consistency of result. There are many reasons for what may be an unacceptable degree of divergence of results in cases that are essentially identical. Some of these reasons are salutary; some are not.

In the first cycle of this new subcommittee of the Family Practice Committee, we sought to examine the concept of alimony, its foundations and applications, both in a historical and current context. We sought to derive some common starting ground for alimony determinations by investigating and analyzing the methods and philosophies that prevail in New Jersey and other states.

In addition to analyzing "rules" that could be derived from statutes and case law, we sought to gather, organize, and formulate if necessary, creative approaches to alimony determinations. The addition of "creativity" to "consistency" should favor the equitable result for which both the bench and bar strive.

The end result of the subcommittee's investigation is intended to be published in a comprehensive report, setting forth the full extent of various concerns and potential solutions to the following issues:

1. The Alimony Statute, *N.J.S.A.* 2A:34-23

   a. How are the various factors of the alimony statute to be weighted against each other?

   b. What are the appropriate circumstances for limited duration alimony? Limited duration alimony is not a substitute for permanent alimony; neither is it a substitute for rehabilitative alimony. The specific parameters, however, have never specifically been articulated.

2. Inter-relationship of Alimony to Child Support

   Children are to be supported based upon the current income of the parents, while alimony amounts are based upon the lifestyle attained during the course of the marriage. If the alimony-supported marital lifestyle is less opulent than the lifestyle concomitant with the supporting parent's current income, or if there is no alimony at all, in what manner are the children to be supported by the custodial parent? How is that increased lifestyle to be provided to the children without providing the same lifestyle to the custodial parent?

3. Duplication of Expenses in Alimony and Child Support Considerations

   When alimony is intended to provide for all roof expenses of the spouse and the children, should the 38% of the child support award that pertains to fixed expenses be deducted from the child support award? If the 38% is not deducted, is the supporting

spouse, in essence, paying for the children's roof expenses twice? If the 38% is deducted from the child support and the schedule A expenses for the children left as part of the alimony award, is a decrease in alimony appropriate at the time the children become emancipated?

4. Gender Gap in Alimony Determinations

Recent studies have shown that a gender gap exists nationwide in alimony determinations. Does this gender gap exist also in New Jersey? What can the trial court do to ensure that the gender gap no longer prevails?

5. Adjustment of Alimony When Equitable Distribution Is Being Paid Out Over Time

When one spouse is buying a supported spouse out of a marital asset such as a business, in many instances, alimony is adjusted. Are the results equitable? How are the payout payments to be considered into the alimony determination?

6. Divergence Between Pendente Lite and Final Alimony Awards

It is generally agreed that *pendente lite* alimony differs substantially from final alimony. What are the factors that cause the divergence between these two types of alimony awards?

7. Effect of Income Earned by Equitably Distributed Assets

Retirement assets that have been equitably distributed, by statute, are not included in alimony calculations. Should similar considerations be taken into account with regard to

nonretirement assets that have been, or are to be, equitably distributed? The income attribution formula in *Miller* also arises in this context. Should a percentage of income be attributed to nonliquid assets, such as homes, cars, etc., that have been equitably distributed or that have been acquired post judgment?

8. Alimony Information Derived From Case Information Statements

Need is an essential element of the alimony calculation. The Case Information Statement discloses a compendium of information upon which judges rely in calculating alimony. The Case Information Statement, however, does not disclose the supported spouse's needs without regard to the needs of supported children living with that spouse. How can this information be relayed to the trial judge, within or without the Case Information Statement, so that the trial judge has accurate and substantiated need figures upon which to base an alimony award?

9. Use of Software Programs in Calculating Alimony

Various software programs are available for alimony calculations; one such program is the Family Soft program that is to used by the judiciary. Others are FinPlan and Divorce Settlement Assistant. What are other available programs? How do these programs differ from each other and which are the most valid? Should the judiciary be equipped with any of these software programs?

10. Amount of Child Support Attributed to Parent of Primary Residence in a Shared Parenting Child Support Calculation

One of the factors to be taken into consideration in establishing the needs of the supported spouse should be that spouse's share of the basic child support amount attributed to the children. A sole parenting worksheet indicates the custodial parent's share of the child support amount. The shared parenting worksheet, however, does not indicate the parent of primary residence's share of child support. Why is this amount not listed? Can it be listed on subsequent editions of child support software? How does the trial court ensure that the supported spouse has sufficient income to cover his or her share of child support in a shared parenting situation?

11. Life Insurance as Security for Alimony Payments

Life insurance is frequently used as security for support payments. What formula should be used for calculation of a sufficient quantum of life insurance?

The subcommittee spent the first part of this cycle articulating the issues to be addressed by the subcommittee and delineating the approaches to issue resolutions. It was the subcommittee's desire to articulate the general areas of concern and issues involved, while seeking solutions that were practical, equitable and aligned with prevailing statutory and case law. The solutions were to be designed to provide a framework for creativity of the bench and the bar.

The subcommittee has divided the issues among its members and has sought to generate resolutions of the various issues in a number of different ways. First, research is being

conducted with regard to literature in the area. Secondly, inquiry has been made of members of various matrimonial lawyer organizations to ascertain ways in which other jurisdictions deal with some of these issues. Third and most importantly, a survey was formulated and intended to be sent to Family Part judges in order to ascertain creative resolutions that various members of the judiciary had formulated in dealing with the issues and to then circulate those resolutions among all Family Part judges.

The survey was to provide the primary source of the subcommittee's proposed resolutions. Due to a lack of formulation of standards as to judicial surveys, however, the subcommittee's survey recently was put "on hold." This has substantially impacted the subcommittee's work, as the subcommittee had intended on acting as a conduit for the judiciary in developing ranges of resolutions to the various issues. Due to the "on hold" status of the survey, the subcommittee is requesting submission of a report midway through the next cycle, after which time a revamped survey may have been submitted.

Meanwhile, the subcommittee continues to research on an informal basis various approaches to resolutions in the areas of concern indicated above. We are in the process of compiling materials received from other jurisdictions, various periodical literature and the data gleaned from other informal surveys.

Alimony calculations are a substantial part of post-marital financing. Without broad parameters and/or some resolution on a statewide basis of the issues to be determined, substantial equity and justice may escape many matrimonial litigants. We anticipate that a new survey will be forthcoming in the next several months and that, with the permission of the Supreme Court, an interim report will be submitted at the end of 2002.

In the meantime, the Judicial Education Subcommittee has graciously allowed the Financial Aspects of Divorce Subcommittee to draft a proposed chapter on alimony in what will ultimately be the New Jersey Family Court Bench Book. This activity is an alternate that was effected after cancellation of the survey. Work will begin on the alimony chapter after the New Year and drafts will be circulating periodically during the next cycle.

Because these concerns are far from a complete listing of considerations in alimony awards, the subcommittee views its work as a continuing process. The areas of concern will be addressed and supplemented and solutions will be modified. The subcommittee believes that discussion and proposed resolutions to various areas of concerns will result in alimony determinations that are more consistent from judge to judge and vicinage to vicinage, all resulting in increased equity and justice.

B. Standardization of Motion Days

The General Procedures and Rules Subcommittee has preliminarily considered the issue of whether, state-wide, motion days should be standardized, as well as delays experienced in some vicinages in re-calendaring motions beyond their initial return date. The Subcommittee preliminarily suggests that if motion days are not held every Friday in a particular county/vicinage, motions be scheduled for the "off" Fridays or such other times during the week immediately following the original return date if permitted by the court's calendar.

The Subcommittee perceives that the delay in the disposition of motions is a serious concern and one worthy of further study. The Subcommittee recommends that the topic should be considered as part of the Subcommittee's agenda for the 2002-2004 Rules Cycle and that in connection therewith, a survey should be conducted of the 15 vicinages addressing the following issues:

(A) Does the vicinage hear motions every Friday or every other Friday;

(B) How many motions are administratively adjourned from their initial return date to a subsequent date;

(C) If so adjourned, are they regularly scheduled for the next possible regular motion day;

(D) How many counties have experimented with scheduling postponed motions on non-motion days;

(E) Does the vicinage have sufficient judicial resources to hear motions each week.

C. Applicability of No-Day or Same-Day Rule to Entry of Judgments of Divorce

A member of the Supreme Court Family Practice Committee raised a related question with respect to Same Day Orders at the Committee meeting on October 30, 2001. The issue was whether the "No Day Rule" would apply to Judgments of Divorce. The initial reaction was that it should not, in part, because doing so would cause problems were a temporary judgment of divorce to be signed subject to an amended judgment of divorce submitted at a later date. It was suggested that study of this topic should be regarded as a reserved issue for further consideration by the General Procedures and Rules Subcommittee in the 2002-2004 term.

D. Order to Show Cause Practice

The General Procedures and Rules Subcommittee noted that there is wide disparity among the counties with respect to how Orders to Show Cause are treated. It is recommended by the Subcommittee that this issue should be a matter for specific consideration during the next Rules Cycle. As part of this examination, a survey should be undertaken.

E. Case Information Statements

The General Procedures and Rules Subcommittee specifically did not consider a revision to the Case Information Statement (CIS) form because of the major revision undertaken and approved during the 1998-2000 Rules Cycle. In conducting its traditional supervision of the CIS form, the Subcommittee recommends its consideration during the 2002-2004 Rules Cycle.

F. Access to Court Documents

The General Procedures and Rules Subcommittee has commenced a discussion of the release of sensitive information such as Social Security numbers, bank account numbers, and tax returns. Concern about these topics lead to further discussion about general access to case information statements and other sensitive matters that, within the context of Family Part actions, are routinely submitted to the court. Because this is an issue of great concern, implicating questions of public access and a sense by many parties that there should be confidentiality, the issue should be reserved for consideration during the 2002-2004 Rules Cycle.

G. Arbitration/Private Judging

The General Procedures and Rules Subcommittee recommended that the issue of utilization of arbitration and/or private judging should be addressed during the 2002-2004 Rules Cycle.

H. Counsel Fee Procedures

A member of the General Procedures and Rules Subcommittee requests consideration be given to the implementation of the holdings set forth in *Yueh v. Yueh*, 329 *N.J.Super*. 447 (App. Div. 2000). This topic, together with the general topic of consideration of counsel fee matters, should be reserved until the next cycle.

I. Motion Appearance before Filing of Responsive Pleading

The General Procedures and Rules Subcommittee received from the Chair correspondence which asked that consideration be given concerning what procedure is to be followed when a party chooses to respond to a dissolution motion before filing an answer i.e., before issue is joined. A suggestion has been made that, at minimum, parties who wish to respond to a motion prior to filing an answer, at least file an appearance. This topic should be placed on the agenda for consideration during the 2002-2004 Rules Cycle.

J. Kinship Legal Guardianship – Further Recommended Rules (Recommended as new *R.* 5:9A)

As set forth in section I (subparagraph L) and section II (Subparagraph A), above, this new law will necessitate the establishment of new procedures for the Family Part and may well require new or changed Rules. Due to the late enactment of the new statutory scheme, in addition to the proposed new *Rule* 5:9A establishing the new category of cases, the Family Practice Committee and the Children in Court Subcommittee will undertake review for any needed additional Rule recommendations.

K. Appeals of Children in Court Cases

The Children in Court Subcommittee discussed the need for rules and procedural changes to the appellate practice in cases denominated in the Family Part as FN and FG docket matters. As the proceedings in the trial courts have been expedited and streamlined, there has been a concomitant need to address the sometimes egregious delays in those cases at the appellate level. Fortunately, at the same time as the Subcommittee has been aware of the need for action in this regard, the Appellate Division judges and administrators have been spearheading an effort to institute protocols specifically aimed at moving those cases through the appellate process as

smoothly and speedily as possible, so that the process itself does not visit more harm on the children involved. The Subcommittee has determined that the Appellate Division Protocol, which essentially assures reasonable enforcement of existing Part II rules, will very likely succeed in enhancing the Judicial process for dealing with Children-In-Court cases, and that no new rules are necessary at this time. This issue will continue to be reviewed.

L. Review of Inter-vicinage Transfer of Child Support Matters and Revision of Transfer Police for Inter-county Matters

This topic represents what started out as two topics: Intervicinage Transfer of Child Support Matters and Revision of Transfer Policy for Intercounty Matters. The Child Support Subcommittee determined that it was appropriate to combine the topics since the issues raised by both are interrelated. Discussion is ongoing with this topic and it is anticipated that the Ad Hoc Intercounty Transfer Policy Review Committee, created and convened to interface with the Child Support Subcommittee, will meet in the future to explore appropriate and necessary recommendations.

The intercounty enforcement of support cases continues to be a source of concern for this subcommittee. Under the current court rules, and policy promulgated by the Administrative Office of the Courts, if the obligor and obligee live in different counties, the Probation Office in the obligor's county of residence is required to enforce the child support order. Except for domestic violence matters, the county of venue has a limited role in enforcement matters. This policy can result in lengthy and unnecessary enforcement delays. If the obligor resides in a county other than the county of venue, collection and enforcement responsibility currently must, in most cases, be transferred to the obligor's county of residence. It appears that counties frequently disagree about which one should be responsible for the order, which can result in long delays before there is any enforcement of the order. When collection and enforcement functions

are removed from the county where the case is venued, the result has been unnecessary delays, confusion to parties when two different counties are involved, and lack of coordination between the two counties. The transfer policy was originated initially so that the obligor could go to his/her probation division office and pay child support. However, that need has been reduced to a great extent by the requirement that support be collected by wage execution.

Despite the implementation of centralized collections in New Jersey, pursuant to *Rule* 5:7 (b) the responsibility of a county to enforce a support case is determined by the county of the obligor's residence. (Domestic violence cases are an exception). Many feel that when the obligee and obligor are in separate counties, i.e. the obligee resides in the county of venue and the obligor lives in a different county, that enforcement activity suffers delays, confusion and that there is not communication or cooperation between the two counties. Disputes may arise as to whom is responsible for enforcement and the parties are caught in the middle. Some question the wisdom of maintaining enforcement's link to the county of the obligor's residence. Also relevant to the discussion is the role of the Sheriff's Office in executing support bench warrants in other than their own county. At the present time the Subcommittee does not proffer any recommendations and will continue working on these issues. Appendix E, annexed hereto, sets forth some concepts to explore and possible options.

In order to determine whether the transfer policy any longer serves any useful purpose, an *ad hoc* Intercounty Transfer Policy Review Committee was constituted. Among the committee members were representatives from the Child Support Subcommittee, and the Family and Probation Divisions. The review committee convened to review the AOC Intercounty Transfer Policy and make recommendations for changes. After several meetings, the review committee concluded that in order to effectuate any meaningful changes, amendments to the court rules

would be required. Moreover, since the county sheriffs are an integral component of the enforcement process, revised cooperative agreements would need to be executed between the sheriffs' offices and the state IV-D agency. In this way, sheriffs would receive final incentives for making out-of-county arrests. It also became obvious that the various AOC Domestic Violence committees would need to have input into any policy changes. Faced with these obstacles, Mary DeLeo, AOC Assistant Director, Family Practice Division, recommended that a joint working group convene to review the conclusion and recommendations of the review committee. This working group would comprise representatives from the Family and Probation Division, Division of Family Development, Sheriffs Association, and the Domestic Violence Committee. It is anticipated that the working group will meet in the coming year.

M. Applicability of Child Support Guidelines for College Students Who Commute

At the final meeting, the Child Support Subcommittee raised a recommendation brought by one of the members of the Supreme Court Family Practice Committee. The recommendation was that there be a distinction for college students commuting from home when awarding child support so that the child support guidelines are still applicable. After some debate, it was agreed that this issue would need further consideration and would be carried to the 2002-2004 cycle.

N. Use of Audio and Videotapes for Child Custody Evaluations

See Appendix A, "Reserved Issues", Report of the Custody and Parenting Time Subcomittee.

O. Roles of Attorneys and Guardians ad litem for Children

See Appendix A, "Reserved Issues", Report of the Custody and Parenting Time Subcomittee.

P. Use of Probation Officers in Conducting Best Interest Evaluations

See Appendix A, "Reserved Issues", Report of the Custody and Parenting Time Subcomittee.

Q. Court's Receipt of Expert's Report

See Appendix A, "Reserved Issues", Report of the Custody and Parenting Time Subcomittee.